SUPREME COURT, U.S.
FILED
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MICHAEL ROLAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

vs.

WILLIAM J. BAXLEY, in His Capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in His Capacity as Prosecuting Attorney for the Tenth Judicial Circuit of Alabama; and HERBERT JENKINS, JR., in His Capacity as Assistant City Attorney for the City of Birmingham, Alabama,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

BRIEF

Of Appellee Herbert Jenkins, Jr., in His Capacity as Assistant City Attorney for the City of Birmingham

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Of Appellee Herbert Jenkins, Jr., in His Capacity as Assistant City Attorney for the City of Birmingham

QUESTIONS PRESENTED

I

Whether or not the principles of the series of cases headed by *Younger v. Harris*, 401 U.S. 376 (1971), are applicable to a pending state court proceeding to abate a nuisance which proceeding is pursuant to state statutes in aid of state criminal laws.

STATEMENT OF FACTS

The appellee, Herbert Jenkins, Jr., as Assistant City Attorney for the City of Birmingham, filed on behalf of the State of Alabama, a suit dated March 7, 1973, in the Circuit Court for the Tenth Judicial Circuit of Alabama—In Equity—Case Number 177-199, against appellants, MTM, Inc.; Chester McKinney; Thomas McGary and fictitious parties, under the Alabama Nuisance Law, Title 7, Sections 1091-1108, Code of Alabama 1940 (Recompiled 1958), to abate the maintenance of a nuisance at the Pussycat Adult Theatre at 7610 First Avenue North in the City of Birmingham, Alabama, which was for the continued and repeated violations of the City of Birmingham Obscenity Ordinance Number 67-2, and based upon numerous convictions for violation of said ordinance by the appellants which said convictions cumulated to a noxious public nuisance.

A temporary injunction closing the nuisance was granted by the State Court against appellants on May 24, 1973, after a hearing, and in the meantime the appellants filed the present suit in the U. S. District Court for the Northern District of Alabama seeking to enjoin the enforcement of the temporary injunction and for a declaratory judgment that the State statute under which the temporary injunction was obtained is unconstitutional as written and or as applied. No appeal was taken in the State Court proceedings as to the issuance of the temporary injunction although an appeal was available in the State Courts. No final hearing upon the issue of whether the injunction should be made permanent was had at the request of appellants or with their approval pending the outcome of the federal suit.

After a hearing in the U. S. District Court before a three-judge panel, a judgment was entered on October 18, 1973,

denying the relief sought based upon the principles of equity, comity, and federalism announced in the case of *Younger v. Harris*, 401 U.S. 376 (1971).

A Notice of Appeal to the Supreme Court of the United States was filed by appellants on the 9th day of November, 1973.

On January 21, 1974, this appellee received appellants' Statement of Jurisdiction which was filed on January 16, 1974, in the Supreme Court.

Review was granted on March 18, 1974.

Brief and appendix of appellants was received on August 12, 1974 which was due to be filed on May 2, 1974.

Appellee has not received a notice of an extension of time for such filing and therefore the appeal was not perfected within the time allowed from the granting of the review on March 18, 1974.

ARGUMENT

The appellee urges this Honorable Court to affirm the judgment of the U. S. District Court for the Northern District of Alabama—Southern Division—on the ground that the appeal fails to present any substantial federal question and further that this case is not one for appeal and does not require further argument.

The issue involved here has been answered both in *Younger v. Harris*, 401 U.S. 37, and in *Mitchum v. Foster*, 407 U.S. 225. This Honorable Court made it clear in these two cases that federal intervention in state court proceedings which are pending is not permitted in the absence of certain exceptional circumstances.

The appellants seem to believe that the judgment of the District Court was wrong because of its determination that the proceeding in question was in the nature of a criminal action. Although they admit the numerous convictions for violation of the City obscenity laws, it is insisted that the State Nuisance Statute permits only a civil action and not a criminal one, and that therefore the principles of *Younger v. Harris*, supra, do not apply. The action in the state court sought to be enjoined is still pending. It was an action taken in aid of the criminal laws of this state and its subdivisions. In *Gibson v. Berryhill*, 411 U.S. 564, this court indicates that the principles of *Younger v. Harris* are applicable to at least quasi-criminal cases pending in state courts and that if a state court has held an action is quasi-criminal in nature then the federal court will so consider it and apply *Younger* principles. The Alabama Supreme Court has held that an action under the statutes here involved may be deemed a quasi-criminal action. *Ridge v. State*, 206 Ala. 349, 89 So. 742. Obviously, this appeal presents an unsubstantial question and does not deserve this court's attention nor does it need further argument.

In *Gibson v. Berryhill*, supra, this court explicitly said that pending criminal proceedings to which Younger principles are applicable include cases involving quasi-criminal proceedings. There the court said in discussing the *Geiger* cases cited and quoted in *Gibson* as follows:

> "Appellants now insist not only that the issue is posed here by the pendency of proceedings before the state board, but also that the issue was actually decided following Younger by our summary affirmance in the case of *Geiger v. Jenkins*, 401 U.S. 985, 91 S.Ct. 1236, 28 L.Ed.2d 525 (1971). In that case the State Medical Board of Georgia noticed hearings on charges filed against a medical practitioner who immediately brought suit in federal court under § 1983 seeking an injunction on the ground that the underlying statute the Medical Board sought to enforce was unconstitutional. The District Court dismissed the action without reaching the merits, holding that the state proceedings were 'in the nature of criminal proceedings,' sufficiently so in any event to trigger the 28 U.S.C. § 2283 bar to federal intervention. 316 F.Supp. 370 (ND Ga. 1970). The decision was appealed to this Court and summarily affirmed without opinion but with citation to Younger and Mackell." At page 1696, 93 S. Ct.

Also, this court said there that if in a case in question there is a judicial finding that under applicable state law the nature of the pending proceedings in the state court is quasi-criminal, then it would be appropriate to apply Younger and dismiss it. The Alabama Supreme Court has in *Ridge v. State*, supra, held that an action under the statute here involved could be deemed to be a quasi-criminal action. In keeping with *Geiger* and *Gibson*, the District Court, although citing a different case, found that the action made the subject of this suit was in the nature of a criminal proceedings. The court indicated that it was at least "sufficiently so in any event to trigger the 28 U.S.C. § 2283 bar to federal intervention." In so doing, the District

Court came to the same conclusion as to the instant action as was made in *Geiger*. That was in keeping with the U. S. Fifth Circuits reasoning in the cases cited by the court in its opinion *Duke v. Texas*, No. 71-2845 (C. A. 5, 4/20/73); *Palaio v. McAuliffe*, 466 F.2d 456 (C. A. 5, 1971). So finding, it was incumbent upon the District Court to dismiss the complaint below.

Appellants do not argue that the nature of this case is purely civil since appellants admit it was to prohibit further repetitious violation of obscenity laws, and they admit the action was pending when this suit was filed. Such action was not an administrative remedy or proceeding, but a quasi-criminal one instituted in aid of enforcement of the laws of Alabama or its subdivisions. Additionally the obscenity convictions made the basis of this suit are still pending in the state courts and are on appeal. In *Gibson*, it was inferred that even an administrative proceeding, if it be deemed quasi-criminal in nature, would be a "sufficient pending criminal proceeding" within the ambit of Younger.

In any event, this court clearly emphasized in *Steppel v. Thompson*, — U.S. —, 94 S. Ct. 1209, — L.Ed.3rd —, that when there is pending a state criminal prosecution, the federal courts will not intervene in the absence of those unusual circumstances which may constitute an exception to 28 U.S.C. 2283.

Furthermore, the principle of *Kenosha v. Bruno*, — U.S. —, 93 S. Ct. 2222, — L.Ed.3rd —, that a civil rights action for declaratory and injunctive relief against municipalities will not be entertained in federal court because they are not "persons" is also applicable to actions against the state even though such a suit only names prosecuting officials in their official capacities and fails to allege that such parties acted outside their official capacities. In such cases, the relief sought is actually against the government and should not be allowed. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This principle is aside from that of Prosecuting Officials' judicial immunity in such cases. *Pierson v. Ray*, 386 U.S. 547.

CONCLUSION

For the reasons stated, it is respectfully urged that the action of the District Court be affirmed.

Respectfully submitted

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